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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 78.

DAVID G. DIMICK,
PETITIONER,
v.
PETER SCHIEDT,
RESPONDENT.

PETITIONER'S BRIEF.

OPINION BELOW.

This case is before this Court on a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit, granted October 8, 1934.

The opinion of the Circuit Court of Appeals is reported in 70 Fed. (2d) 558, and appears in the record, commencing at page 39. The District Court delivered no opinion—its order appears at page 7 of the record.

JURISDICTION.

The jurisdiction of this Court is invoked under section 240 (*a*) of the Judicial Code as amended by the Act of February 13, 1925, now United States Code, Tit. 28, sec. 347 (*a*).

STATEMENT OF THE CASE.

The case of *Peter Schiedt, plaintiff,* v. *David G. Dimick, defendant,* No. 5144 on the Law Docket of the District Court of the United States for the District of Massachusetts, being a claim for injuries alleged to have been sustained while the plaintiff, as a pedestrian, was crossing a public highway in Medford, Massachusetts, was tried before a jury and a verdict returned March 28, 1933, for the plaintiff in the sum of $500.

On March 29, 1933, a motion for a new trial was filed by the plaintiff, setting forth the following reasons (R. 7):

> "1. Because the verdict is against the evidence and the weight of the evidence.
> "2. Because the verdict is a compromise verdict and illegal.
> "3. Because the damages are inadequate."

On this motion the Court entered the following order:

> "April 14, 1933. McLellan, J. On the authority of *Gaffney* v. *Illingsworth,* 90 N. J. L. 490, and *Carr* v. *Miner,* 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried de novo, both on the question of liability and damages."

On the 17th day of April, 1933, the following stipulation, consenting to increase in the amount of damages awarded, was filed:

> "In accordance with the order of court herein made, with regard to new trial, the defendant files this stipu-

lation, hereby consenting to an increase of one thousand dollars ($1,000) in the damages awarded, from the sum of five hundred dollars ($500) awarded by the jury to fifteen hundred dollars ($1,500)."

It will be observed that the motion, if the stipulation be filed, is "to be denied" or otherwise "to be granted." After the stipulation was filed, no further order of denial was made. It may well be that an entry should have been made of "Motion Denied," but none such appears. The petitioner maintains that, strictly speaking, such an order must be read into this record as of some date subsequent to April 17, 1933, and that the respondent's rights, if any, center around such implied order.

The plaintiff in the said action, on April 17, 1933, filed a claim of exception to the order of April 14, 1933.

September 11, 1933, judgment was entered in behalf of Peter Schiedt in the sum of $1540.75 damages and interest, together with costs of suit taxed at $40.75. The plaintiff filed a substitute bill of exceptions, which was filed and allowed August 22, 1933, and duly entered in the United States Circuit Court of Appeals for the First Circuit August 22, 1933. The plaintiff also filed a petition for appeal to the said Circuit Court on the 15th day of November, 1933, and an assignment of errors, setting forth in substance that the Court erred in its order of April 14, 1933.

The case was duly set down for argument in the Circuit Court and was there argued by counsel, and on April 20, 1934, the said Circuit Court ordered that "the judgment of the District Court is reversed with costs and the case is remanded to that Court for further proceedings not inconsistent with this opinion." The said opinion of the Court was a divided opinion. Wilson and Morris, JJ., being the majority, and Morton, J., submitting the dissenting opinion.

The Question Presented.

The broad question here presented, which was discussed by the Circuit Court of Appeals, is whether a judge of the District Court has the power to make an order denying a plaintiff's motion for a new trial, based in substance upon inadequacy of damages, upon a stipulation for increase in the amount of damages having been filed by the defendant in an amount suggested by the Court.

The narrower question may be whether, strictly speaking, the order or memorandum made by the judge is really the order subject to review or whether the respondent is confronted with an order of denial presumed to have been made after the stipulation for additional damages was filed and whether this order rests within the sound discretion of the trial court.

It is surely true that nothing except inadequacy of damages is argued by the respondent. Although his motion (R. 7) alleges three grounds, he has at no time indicated any objection to the verdict on liability.

The Statutes Involved.

As stated in the opinion of the Circuit Court, at the bottom of page 41 of the record—

> "the only Federal Statute relating to new trials is Sec. 726 R. S. as amended by Chap. 48, 40 Stat. 1181, 28 U. S. C. A. Sec. 391, which provides that:
>
> " 'All United States courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law.' "

The Seventh Amendment to the Constitution reads as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Specification of Errors to be Urged.

The Circuit Court of Appeals erred—

1. In holding that there was any requirement of the Seventh Amendment to the Federal Constitution preventing a Federal District Judge in a common-law action from denying a motion for new trial by the plaintiff on the ground of inadequate damages, provided that the defendant consents that judgment be entered for an additional sum fixed by the Court.

2. In holding that there was any requirement at common law preventing a Federal District Judge in a common-law action from denying a motion for new trial by the plaintiff on the ground of inadequate damages, provided that the defendant consents that judgment be entered for an additional sum fixed by the Court.

3. In holding that the action of the Federal District Judge in this case amounted to a re-examination of the facts.

Summary of the Argument.

I. The importance of the proposed practice.

II. Federal Courts, in their approach to the trial of facts, differ substantially from State Courts.

III. The petitioner does not concede that the common law, as understood at the time of our Constitution, forbade the suggestion of Court that verdicts be increased.

IV. The plaintiff cannot be heard to say that he has not had a trial by jury.

V. The fact that a judge makes an order with reference to the amount of damages is not tantamount to a finding that there has been such passion or prejudice at work in the jury as to destroy the essential character of the jury trial.

VI. There is no sound difference in logic between remittitur and the practice suggested in the case at bar.

VII. When all is said and done, the case resolves itself into a question of the discretion of the Court.

I. The importance of the proposed practice is sufficient to justify its adoption even though there be no precedent in the Federal Courts.

It hardly seems necessary to argue that the adoption of a precedent such as the one under consideration might work to a great saving of time and expense. There can be no doubt that the entire membership of the Circuit Court of Appeals, according to their written expression of opinion, would consider it an advisable procedure; the majority of that Court simply felt that they were unable to adopt it. We assume that the very admission of the question to this Court indicates that the matter is one of public importance. It has been argued in this case, and will doubtless be argued again, that upon a retrial of the tort case herein involved the question might become of no consequence, but it is apparent that there is sufficient of public importance attached to the problem to transcend private interest.

It has likewise been argued that there is no precedent, even at common law, in favor of the action of the judge of the District Court. We are not prepared to admit that this is fully true. We do admit that there is no Federal precedent for it, but, at the same time, the petitioner maintains that there is nothing against it, unless we take the Watt case (1905 A.C.

115) in England, which has been liberally referred to in the opinions below. The Watt case, however, if it be adopted in its entirety, would abolish our entire practice of remittitur, and, as is stated by Morton, J., in his dissenting opinion (R. 49), ". . . is clearly not the law of the Federal Courts."

The question as to whether the Circuit Court of Appeals rightfully undertook to review the action of the trial court comes to this Court, we believe, as a new question. The action of the trial court, so far as the plaintiff is concerned, was essentially a denial of a motion for a new trial based on failure to award substantial damages. The method by which the Court arrived at its conclusion was unimportant if the result was correct and within the discretion of the Court.

> "Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion, we have no occasion to determine."
>
> *Fairmount Glass Works* v. *Cub Fork Coal Co. et al.*, 287 U.S. 474, at 485.

II. Federal Courts differ in their approach to disposal of facts from practice in some State Courts.

While we fully appreciate the constitutional guarantee of trial by jury and the right of a litigant to have a fair and impartial trial of all facts, it is to be recalled that there are certain particulars in which trial in the Federal Court may differ from that in the State Court.

A Federal judge is not restricted by local statutes or rulings adopted by the other Courts in the State where he may sit. Although due regard is paid to the law of the district, these statutes cannot alter the essential character or functions of the Federal Court.

Herron v. *Southern Pacific Co.*, 283 U.S. 91.

Our Federal Courts can direct a jury on a proper occasion to find a verdict in accordance with the views of the Court, if the Court considers the evidence insufficient in fact to support an opposite verdict, even though there may be some evidence in favor of the party against whom the verdict was directed.

Hepner v. *United States,* 213 U.S. 103.
Barrett v. *Virginian Railway Co.,* 250 U.S. 473.

This practice is justified because "... it is a convenient one, it saves time and expense, it gives scientific certainty to the law in its application to the facts and promotes the ends of justice."

Contrary to State practice, a judge can express himself in favor of one party or the other if he so desires.

Lincoln v. *Power,* 151 U.S. 436, at 442.

The Federal Court is not obliged to send a case to the jury just because there is a scintilla of evidence.

Commissioners of Marion County v. *Clark,* 94 U.S. 278, 284.
Penn R.R. v. *Chamberlain,* 288 U.S. 333, 343.

If the practice in the Federal Court, however sparingly it may be used, permitting a judge to disregard the scintilla of evidence if he sees fit, is not a violation of the Constitution, then it follows necessarily that not every interference with the function of the jury is necessarily an infraction of their rights or a denial of rights to the parties.

It is guaranteed by the Seventh Amendment that "No fact tried by a jury shall be otherwise re-examined by any court of the United States than according to the rule of the common law." It might be a pertinent inquiry to ask the meaning of the word "fact." In a tort case liability or no lia-

bility is surely a fact, and so is the existence or non-existence of injury, but when we come to placing an estimate in dollars and cents upon the extent of damage we may all be at a loss to know as to whether there is any such certainty or fixed character about this feature of the case as to dignify a jury's estimate of the monetary value of damages as a "fact." Attention is directed to page 50 of the record, where Morton, J., refers to the freedom of the older judges in dealing with damages found by a jury, and the distinction recognized between questions of liability and the amount of damages.

III. The petitioner does not concede that the common law, as understood at the time of our Constitution, forbade the suggestion by Court that the verdict be increased.

See reference in Ann. Cases, 1916 B, in note beginning at page 384, to old English cases, where verdicts in assault and battery cases amounting to mayhem might be increased by the Court on view of the person and a further discussion of the subject of inadequacy of damages in this note and other volumes of Annotated Cases referred to therein. A note in Annotated Cases, 1914 C, at page 850, maintains that under the old common-law rule a new trial in an action for injuries to the person was not granted on the ground of inadequate damages. The practice was a matter of development.

In *Belt* v. *Lawes,* 12 Q.B.D. 356, the language at page 358 is striking: "The Court does not give damages, but it only says that if the jury had given a sum which was a part of what they had given, the Court would not have been dissatisfied, but more than that, as the power of the Court is discretionary, it seems to me it is competent to the Court to exercise such power in any way which is not unjust." There later occurs the language set out on page 49 of our record, wherein the learned judge intimates that the very practice resorted to in the case at bar may be possible.

Whatever may be said as to later overruling of *Belt* v. *Lawes,* it still remains that as late as this Belt case (1884) there was a belief that the practice of suggesting an increase in verdict was not impossible under the English common law. The case represents the idea of the law as understood up to that time, which would include its interpretation at the time of the adoption of our Constitution and the Seventh Amendment.

IV. This plaintiff cannot be heard to say that he has not had a trial by jury.

Although the Seventh Amendment guarantees trial by jury, we feel that there is a considerable amount of popular misapprehension as to what trial by jury means.

In a criminal case this Honorable Court has defined the constitutional guarantee of trial by jury.

> *Patton* v. *United States,* 281 U.S. 276, at page 288 *et seq.*

The elements are: (1) the twelve-man jury;
(2) the superintendence of the judge, and—
(3) the unanimous verdict.

The plaintiff cannot say that he has not had this guaranteed trial and findings by the jury, that the defendant was liable, and that the plaintiff was injured. Indeed, these facts are not now in any way disputed. The jury verdict stands as to the facts found by them. Their estimate of the financial worth of the damages has been the only subject under discussion.

In like manner this Court has designated the sort of trial by jury guaranteed in civil cases.

Gasoline Products Co. v. *Champlin Refining Co.*, 283 U.S. 494.
75 Law. Ed. 1188, and note.
Ex parte Peterson, 253 U.S. 300, at 309.

The Constitution is not so hide-bound as to prevent enlightened methods, even though old practices seem to be at variance.

See 31 Harvard Law Review, 669: Trial by jury and the Reform of Civil Procedure, by Professor Austin Wakeman Scott of the Harvard Law School.

No one has been heard to say that the justice of the District Court has not, in the most eminent fashion, guided a jury in its determination of facts, after a trial in which every legal requirement was fulfilled. The single question raised by the disappointed plaintiff is that he did not receive a sufficiently large award.

V. The fact that a judge makes an order with reference to the amount of damages is not tantamount to a finding that there has been such passion or prejudice at work in the jury as to destroy the essential character of a jury trial.

While we must admit that every litigant is entitled to a fair and impartial trial, free from passion or prejudice, yet it does not follow that, because a judge makes an order with reference to damages, he has been deprived of his constitutional right. If this were so, we could have such practice as remittitur. This practice, as believed to be proper at the time of the Constitution, and continued through usage and statute ever since, has approved action by the Court in ordering remission of a part of a plaintiff's verdict at the risk of a new trial. If such an order necessarily meant that there had been passion and prejudice in the minds of the jury or

any other illegal element entering into their verdict, a defendant making a motion for a new trial in the face of such a verdict should have a right to insist upon a complete new trial. The Court justifies its practice of remittitur on the theory that the jury may have been honestly mistaken, and the mere amount of remittitur ordered cannot be argued as proof that the verdict was due to prejudice or wilful disregard of the evidence.

Arkansas Valley Land & Cattle Co. v. *Mann*, 130 U.S. 69.

Minneapolis, St. Paul &c. Ry. Co. v. *Moquin*, 283 U.S. 520.

In the Arkansas Cattle Co. case, at page 76, is this significant language:

> "If the Circuit Court had entered judgment for the whole amount of the verdict below, the defendant could have made no question in this Court as to its being excessive. We could only, in that case, have considered matters of law arising upon the face of the record. And we can do no more when the defendant brings to us a record, showing that the court below has, in the exercise of its discretion, compelled the opposite side, as a condition of its overruling a motion for a new trial, to remit a part of the verdict."

The above language could be paraphrased, and a few of the terms changed, so as to make it fit perfectly the facts of the present case.

> "If it appears that the verdict is tainted with prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted, yet the trial court is in a better position to determine

this than the appellate court, so that its determination should ordinarily be accepted."

Gila Valley Ry. Co. v. *Hall,* 232 U.S. 94.

While no Court can enter an absolute judgment for any other sum than that fixed by the jury (*Kennon* v. *Gilmer,* 131 U.S. 22), and while an order for remittitur must be accompanied by the giving of an election to the plaintiff (*Duke* v. *St. Louis & S.F. R. Co.,* 172 Fed. 684, at 687), the latter case recognizes the practical end of the question when, speaking of remittitur, the Court says, "It may, however, be at the suggestion of the court that if not done a new trial will be granted." In the experience of every lawyer, it is not hard to recall instances where such a "suggestion" has been made by the Court, both to a plaintiff, to take a little less than his verdict, and to a defendant, to give a little bit more than the verdict. The practice of putting this suggestion to the plaintiff in writing in the shape of a remittitur order is common; whether the oral suggestions to defendants to give a little more, and thereby escape the risk of a new trial, is as common, we do not pretend to say, as that is a matter for each one's experience. The trial court in this case merely put in writing what many another judge may have orally suggested to the party.

The Court has further recognized the practical end of remittitur when it says, in *Denny* v. *Pironi,* 141 U.S. 121, at 126: "Remittiturs are used where the judgment has been accidentally ordered for a larger amount than was due or, occasionally, to forestall an appeal." If a party can remove a criticism directed at the verdict or judgment, that it is too large, by remitting an amount sufficient to reduce it to a proper point, it necessarily follows that the size of a verdict cannot, in and of itself, unless it be grossly extravagant error, prove that a party has failed to receive his rights of impartial jury trial.

It is true that cases may be quoted from State Courts where verdicts have been rendered for one dollar, or some such ridiculous sum, where it was clear that this was a grossly extravagant error, and these verdicts have been vacated. The cases have been such, however, that the very record would indicate the error. The present is not one of these cases. Ours is a case where the damages awarded were small, but no human mind can guess as to how the jury estimated these damages; whether they disregarded some of the plaintiff's claims for injury, whether they felt he had too long delayed his use of his injured limbs, whether they adopted the testimony of the defendant's doctor who, nine weeks after the accident, thought the plaintiff could return to work in a month or six weeks (R. 34). They might have felt that the man was entitled to only thirteen weeks' disability. They saw the plaintiff and the witnesses, including the doctors. They may not have been satisfied as to the plaintiff's earning capacity, even before the accident or as to the fair character of the expenses beyond the bills of $60 from the hospital (R. 11, 12). There are a multitude of conclusions which they may have reached, all, so far as we are concerned, highly speculative. The estimate that they placed upon the plaintiff's pain and suffering was all a matter for their own opinion and consciences.

The trial judge, by his order, did nothing more than to indicate that he personally felt that the jury were mistaken as to their estimate of the amount which should be awarded as damages. He gave the defendant a chance to contribute some more money, so as to raise the verdict to a point which he thought would be large enough so that the Court would feel right about denying the motion for a new trial. The reasoning by which he arrived at this result or the citations which he used in the order are of no consequence, if the result reached was a proper one.

We repeat what we have earlier said, we question whether the order of the trial court was more than a memorandum

for an order, and it may well be that the only order which can be properly read into this record is an order denying the motion for new trial. We are prepared to admit that the judge's citations in his order are not on all fours with the present case, but repeat that the method by which he arrived at the result is of no consequence if the result was within his discretion. We likewise argue that if a jury verdict can be amended by a trial court, even in a contract case, it follows that a sweeping statement that there can be no interference with the jury's verdict goes to a greater extreme than any constitutional right of a party.

VI. There is no sound difference in logic between remittitur and the practice suggested in the case at bar.

The justification for remittitur on the ordinary motion for new trial rests on the propositions:

(*a*) as to the defendant moving party, that he can hardly be heard to complain since he is getting something at the hands of the Court which he has asked the Court as a matter of discretion to give him;
(*b*) as to the plaintiff, that he has assented to it.

There may be other fine-spun arguments that awarding a part of the jury's verdict is not a violation of their rights, etc., but, after all, the jury are not concerned with the result if the parties are satisfied.

In remittitur the plaintiff is the prevailing party. By a sort of compulsion or suggestion, whatever you choose to call it, he is urged to remit a part of the verdict or go to the hazard and expense of a new trial: he remits, and the new trial is denied. The act of the Court, by whatever preliminaries it is preceded, is essentially a denial of the motion, and is founded in the discretion of the Court.

The motion is made by the losing party. The decision of the Court falls short of finding such passion, prejudice, or illegality as to vitiate the entire verdict, but feeling that there has been unintentional error or well-intentioned excessive award assists the losing party by its suggestion of remittitur, although it does not grant his prayer in its entirety.

We have spoken above with regard to the "prevailing party." The Court usually has occasion to construe this phrase in connection with awarding of costs, and we do not know that the meaning of the phrase has ever been discussed outside of such cases. It would seem, however, that, in the common acceptance of the term, the plaintiff, having received a verdict in an amount which he claims to be thoroughly inadequate, can hardly be said to be the prevailing party even from his own point of view, and the fact that he has filed a motion for a new trial is his own acknowledgment and claim that he has failed to get that which he sought. In the everyday use of language, therefore, it would seem as if the "prevailing party" at the time of this trial was considered to be the defendant. We believe that when the Court speaks about the "prevailing party," and whether or not he is aggrieved in connection with decisions, on motions for new trials, the Court would be more disposed to use the terms in their everyday use as being equivalent to the party who got the best of the argument, than to restrict the words to cover only the party who received a verdict, however small or large.

In the case at bar the dissatisfied party, who in this case is the plaintiff, moves for new trial on the ground of inadequate damages. There is no finding, necessarily inferred from the memorandum of the Court, to substantiate any claim that the trial is tainted with any illegal element. The Court has denied the plaintiff's motion, but, as a condition precedent to it, has suggested an increase in damages. The plaintiff could have no exception to a complete denial of the motion;

he has addressed his appeal expressly to the discretion of the Court; it does not lie in his mouth to complain as to the manner of the exercise of that discretion. The defendant, who was really the prevailing party at the trial, judging from the motion filed, cannot be heard to complain because he has consented to the increase.

It is beside the point to cite the case of *Shanahan* v. *Boston & Northern St. Ry. Co.*, 193 Mass. 412. In that case there had been a verdict for the defendant. The plaintiff moved for new trial. The Court apparently first determined a new trial should be granted, and thereby implied a finding that there had been no legal trial at all, and then attempted to turn an out-and-out verdict for the defendant into a small plaintiff's verdict, which the plaintiff refused to accept. Clearly, the Court attempted to re-examine the fact of liability, rather than merely to superintend the jury's estimate of damages, and the ultimate result was not based on any fact found by the jury, but was in direct conflict with their finding that there was no liability. Not a particle of the ultimate result could be said to be the jury's verdict, and, if it was to stand at all, it must stand as an agreement of counsel, which counsel refused to make.

Neither are State citations of great value in connection with this problem. As has been pointed out, the power of Federal Courts with regard to trial of facts is different from that of the State Courts. Some State Constitutions vary in their jury trial guarantee from the language of the Federal Constitution, and, in some of the States, there are statutes with regard to the handling of motions for new trial. Our problem is entirely under the Federal Constitution and concerns the Federal Courts. There is sufficient discussion of the powers of the Court in the decisions of this Court and the Federal Courts to solve the problem with the assistance of the logic of the Constitution and the history of jury trial at common law, without reference to the action of the State Courts.

VII. When all is said and done, the case resolves itself into a question of the discretion of the Court.

A motion for a new trial has never been considered a matter of right; it is directed to the discretion of the Court.

McLanahan et als. v. *Universal Insurance Co.*, 1 Peters, 170.

By whatever steps a Court may arrive at a point where its discretion is finally exercised, we still have the discretionary order denying a motion which is not a matter of right.

It is not quite exact to say that the memorandum of the Court in this case has stated the reason for his actions, even though it refers to certain cases as "authority." The reasons of the Court for his action may be eminently practical ones, having to do with the final disposition of the case, and probably are not expressed in the order. The fact that he refers to certain cases as giving him "authority" means nothing if he had the power from any source, including his discretion, to deny this motion after the defendant had accepted the friendly suggestion of the Court that the verdict be increased. It is highly significant that the alternative offered or threatened is not an assessment of damages, but a full trial, giving the defendant an opportunity to defend every issue of the case.

It is therefore respectfully argued that the decision of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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